No. 1654

DEC. 15 189

JAMES H. MCKENNEY,

Filed Dec. 15, 1897.

In the Supreme Court of the United States.

QUINCY A. SHAW, PLAINTIFF IN error, *v.* MURRAY M. KELLOGG, DEFENDANT in error.	No. 154.

BRIEF AND ARGUMENT ON BEHALF OF THE UNITED STATES.

This case is pending in this court on a certificate from the United States circuit court of appeals for the eighth circuit.

The action was ejectment. Possession on behalf of the defendant was admitted, and the only question in the case was whether plaintiff had title.

Plaintiff relies upon section 6 of "An act to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860, and a selection and location thereunder, which section is as follows:

> SEC. 6. *And be it further enacted*, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as claimed by the town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land.

not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however*, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

Under the provisions of this act the heirs of Luis Maria Baca selected certain lands which, at the time of the passage of the act, were a part of the Territory of New Mexico, now a part of the State of Colorado, known as Baca Float No. 4, which contains nearly 100,000 acres. The eastern line of the lands so selected includes a portion of the Sangre de Cristo range of mountains, on which valuable minerals have been discovered, these discoveries having been made as early as 1876.

The land in dispute is a mining claim located on the west slope of the range of Sangre de Cristo Mountains, which is alleged by plaintiff in his complaint, and shown by the proof, to be mineral land, and is included within the limits of Baca grant No. 4, as selected and surveyed.

The contention of the parties may be stated in a few words. On the part of the plaintiff it is that by the act of Congress above recited, the selection by the heirs of Baca, and the survey and other proceedings by the officers of the Government, the Baca heirs, or their representatives, had acquired the absolute title to this property prior to the discovery of mineral thereon, and that the action of the officers of the Government, with reference to such selection and survey, operated as an adjudi-

cation and estopped, as against the Government and those claiming under, it upon the question as to the mineral or non-mineral character of the land, and though the land is now admitted to be mineral, and hence excluded by the terms of the grant, yet by reason of the proceedings and adjudication above referred to the Government of the United States, and all claiming under it, are estopped to claim that the question as to the mineral character of the land is, or was in 1876—the time when mineral was discovered—open.

The defendant claims that there has been no adjudication as to the mineral or non-mineral character of the land; that no action has been taken by the officers of the Government which estop it to claim that the land is mineral, and hence not within the terms of the grant, and that the question as to the mineral character of the land being still open, and this land being admittedly mineral in character, is excluded from the grant; and hence the plaintiff showed no title.

This being the state of the record, the interest of the United States in this controversy is apparent, for if plaintiff's contention prevails the land in dispute, as well as other land of like character within the surveyed boundaries of the selection, passed by the grant, while if the defendant's contention be correct all such land remains a part of the public domain; and it, therefore, through its proper officers, has seen fit to ask permission of this court to file this brief in support of the contention of the defendant in error.

As the facts contained in the certificate have been quite fully stated in briefs of counsel for the original parties

to the cause, it is not necessary that they should be restated at length, and counsel will take the liberty to quote from them in the course of the argument, as the same may seem pertinent.

BRIEF OF ARGUMENT.

The questions involved in this case can, we think, be fully understood if discussed under the following general proposition, namely:

The right granted to the heirs of Baca by the act of June 21, 1860, was a mere right to select a certain quantity of land, in a certain number of parcels, in lieu of other land to which they made claim, and the exercise of this right by the heirs of Baca, or their grantees, vested in them a mere equitable title to the property selected until such selection had been accepted or approved by the proper officers of the Government, or until patent had issued. The effect of the survey by a private surveyor and approval of the plat and field notes of such survey by the surveyor-general was merely to designate upon the face of the earth the particular tract selected and to fix its boundaries, and the right of the heirs of Luis María Baca under this grant is to this day a mere equitable title, and will remain such until, by some act of a duly authorized officer, the legal title of the Government to the property shall pass.

This case having been discussed by counsel for plaintiff in error as though it were admitted that this grant is an ordinary one *in præsenti*, it is important at the outset to ascertain the character of the grant itself; and in order to do this, the granting act, as well as all the surrounding circumstances, must be taken into consideration.

It appears from the recitals of the grant that Luis Maria Baca made claim to a certain land grant in the Territory of New Mexico, which was in conflict with the Pueblo grant claimed by the town of Las Vegas; that the town of Las Vegas secured confirmation of the Pueblo grant, and Congress having thus lost the power to confirm to the heirs of Baca their claim in place, and the Baca heirs having proven, to the satisfaction of Congress, that their claim was a just and equitable one, they were given, by this act, the right to select an equal quantity of vacant land, *not mineral*, in the Territory of New Mexico, instead of the land so claimed by them.

Counsel have referred to the title of this act as showing an intention on the part of Congress to *confirm* the title to the grantees, and thus add force to their argument that the grant should be construed as one *in præsenti*, and in ascertaining what weight should be given to this argument, it is important to note the provisions of other sections of the act.

Section 1 is an act of confirmation of thirteen grants, the granting words being, "That private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory, * * * *be, and they are hereby, confirmed.*"

Section 2 provides for the survey of one of these grants. Section 3 confirms nineteen grants, the granting words being, "That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general, * * * numbered from twenty to thirty-eight, both inclusive, *be, and the same are hereby, confirmed.*"

Section 4 limits the effect of the grant to a quitclaim. Section 5 authorizes suit to be brought against the Government on account of a certain grant therein named, and section 6 is quoted above.

Thus it will be seen the title of the act apparently refers to the main subject of the act, namely, the confirmation of thirty-two private land claims; hence it can not be said to aid the court in arriving at a correct conclusion as to the intention of Congress in enacting the sixth section, especially where its intention is clearly and plainly expressed in the section itself.

Many cases are cited construing grants *in præsenti*, and as the rules of decision laid down in these cases are invoked by counsel for plaintiff in error in this case, it may not be amiss to examine the granting words construed therein, with a view of ascertaining whether the words used by Congress in this case should receive the same construction.

The first case cited is *Rutherford against Greene's heirs*. (2 Wheaton, 197.) The grant under discussion in that case was made by the State of North Carolina in 1782, and provided "That twenty-five thousand acres of land shall be allotted for and given to Major-General Nathaniel Greene."

In pursuance of the direction of the act, commissioners allotted twenty-five thousand acres of land to General Greene, and caused the tract to be surveyed.

On the 12th of April, 1783, the general assembly of North Carolina passed "An act for opening the land office," the provisions of which, it was contended, revoked

or recalled the gift made by the act of 1782 to General Greene. In 1784 an act was passed authorizing the issuance of a grant or patent to General Greene, and pursuant to this act the grant or patent was issued, and the question at issue was, (1) whether the act of 1783 operated as a revocation of the grant to General Greene, and (2) whether the act of 1782 did not operate to vest such a title in General Greene as would support the grant paper or patent issued under the act of 1784; and the court held that the act of 1783, when properly construed, did not operate to revoke the gift of 1782, that the rights vested in General Greene by the act of 1782 were not impaired by the act of 1783, and that such rights became perfect by the grant which issued under the act of 1784.

This is all there was in that case. There was no condition or reservation in the grant, and no question analogous to the question in this case arose or was decided in that case.

The next case cited is *Grignon's Lessee against Astor* (2 How., p. 310). The grant under discussion in that case was approved February 1, 1823 (3 Stat. L., p. 724), and the granting clause is as follows:

"Such persons *are hereby confirmed in their claims*, agreeably to any surveys heretofore made," etc. These words, so well understood at this date, are sufficient to show an intention to make a present grant, and are entirely different from the words used in the act of Congress now under discussion.

The case of *Strother against Lucas* (12 Peters, p. 454) construed the provisions of an act of Congress approved

June 13, 1812, and the words of the granting clause, construed by the court in the excerpt of the opinion quoted in that case and in the brief of counsel for plaintiff, are as follows:

> That the rights, titles, and claims to town or village lots, etc., shall *be, and the same are hereby, confirmed* in the inhabitants of the respective towns and villages aforesaid.

The statute before the Supreme Court in the case of *Chouteau against Eckrd* (2 How., 372) is to be found at the Fifth Statute at Large, page 126, and the granting words are as follows:

> That the decisions in favor of land claimants made by the recorder of land titles in the State of Missouri, and the two commissioners associated with him * * * *be, and the same are hereby, confirmed.*

In *Ryan and others against Carter and others* (93 U. S., p. 78), the court had under consideration the act of June 13, 1812 (2 Stats., 748), and the words construed and held to operate as a grant *in praesenti* are as follows:

> That the rights, titles, and claims to town or village lots * * * adjoining and belonging to the several towns or villages, * * * shall *be, and the same are hereby, confirmed* in the inhabitants of the respective towns or villages aforesaid.

The granting words in all these acts, as well as in the subsequent acts granting lands to railroads, which have been repeatedly construed by this court to operate as grants *in praesenti*, have all contained the words "be and are hereby granted," or the words "be and are

hereby confirmed," or words having equivalent meaning and evidencing the same intention.

In the Union Pacific grant of July 1, 1862 (12 Stat. L., 489), the granting words are "That there *be and is hereby granted* to said company," etc.

In the Northern Pacific Case (see act of July 2, 1864, 13 Stat. L., p. 365) the granting words are "That there *be and hereby is granted*," and in the Atlantic and Pacific Case (see act of July 27, 1866, 14 Stat. L., 293) the granting words are identical with those above quoted.

As is said by Mr. Justice Davis, in the case of *Railroad Company against The United States* (92 U. S., p. 733; L. C., p. 741):

> "*There be and is hereby granted*" are words of absolute donation and import a grant *in præsenti*. This court has held that they can have no other meaning, and the land department on this interpretation of them has uniformly administered every previous, similar grant.

A comparison of the several acts of Congress, which have been construed by this court as grants *in præsenti*, with the act of 1860, giving permission to the heirs of Baca to select a quantity of vacant land, not mineral, in the Territory of New Mexico, will show a broad line of demarcation, and will, we think, show conclusively that it was not the intention of Congress, by the act of 1860, to make a present grant.

We have thus far endeavored to show what this grant is not, and we will now endeavor, if possible, to show by a comparison with other acts of Congress, using similar language, what it is.

It will be noted that the substantial language of the act is as follows:

> That it shall be lawful for the heirs of Luis Maria Baca to select, instead of land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, etc.

In the Northern Pacific grant occurs the following language:

> Whenever * * * any of said sections or parts of sections shall have been granted, sold, reserved, * * * or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior.

In the Atlantic and Pacific grant (14 Stat. L., p. 295) occurs exactly the same language.

And this clause of these statutes is, as is the act of 1860, purely and simply an indemnity grant. These indemnity clauses have never been held to operate as grants *in præsenti*, and have never been considered as effectually passing the title out of the Government until the lands have been selected and such selection formally approved, or the land patented, by the officers of the United States. That there is a broad distinction between "granted lands" under grants which take effect *in præsenti* and "lieu" or indemnity lands, as to which title passes only when the same have been selected and such selection approved, is well settled by this court in the case of *Wisconsin R. R.* v. *Price County* (133 U. S., 496).

By the act of Congress approved July 17, 1854 (10 Stat. L., p. 304), the President was authorized to ex-

change, with certain half-breed Indians for a tract of land to which they were entitled, other lands in lieu thereof, and upon the relinquishment by them to the United States of their interests in their lands the Commissioner of the General Land Office was authorized to issue to such half-breed Indians certificates or scrip for the same amount of land to which each individual would be entitled in case a division of their lands was made. And the act contained this provision: "Which said certificate or scrip may be located upon any of the lands within said reservation not now occupied by actual and *bona fide* settlers," etc.

This act created indemnity grants or floats similar in every particular, except as to the reservation of mineral, to that created by the sixth section of the act of 1860, and the interest acquired by the half-breed Indians named in the act in the lands upon which these certificates were located is identical, as a matter of law, with the interest of the heirs of Luis Maria Baca in land selected by them under the act of 1860, the only difference being that in one case the right to select was evidenced by certificates issued by the Commissioner of the General Land Office while in the other the right to select was given by the act of Congress itself.

In the case of *Carter against Ruddy* (166 U. S., p. 493) the legal status of the holders of certificates under the above-cited act of 1854, after the same had been located and before patent was issued, was before this court, and that case seems to be decisive of this in respect of this question.

The contention in that case was, as it is in this, that the location of the scrip operated to transfer the legal title to the locator; that no patent was necessary, and that the legal title was in him, by virtue of the act of Congress, the certificate, and the location; and with reference to this contention, Mr. Justice Brewer, speaking for the court, says:

> "While it is true that the act of 1854 does not in terms provide for the issue of a patent, and simply authorizes the location of the scrip upon any public lands, yet the general rule is that a patent is necessary for the transfer of the legal title,

citing with approval and quoting from the case of *Bagnell* v. *Broderick* (13 Pet., 436, L. C. 450), as follows:

> 'Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the Federal Government in reference to the public lands declares the patent the superior and conclusive evidence of legal title. Until its issuance the fee is in the Government; by patent it passes to the grantee, and he is entitled to recover the possession in ejectment—'

quoting also with approval the case of *Wilcox* v. *Jackson* (13 Pet., 498), and then disposes of this question thus:

> 'There is nothing to exempt this case from the ordinary rule that a patent is necessary to convey the legal title; that the certificate of location created at best but an equitable title.'"

In the case of *Wilcox* v. *Jackson* (13 Pet., 498; L. C., 516) this court says:

> "We think it unnecessary to go into a detailed examination of the various acts of Congress for the

> purpose of showing what we consider to be true in regard to the public lands—that, with the exception of a few cases, nothing but a patent passes a perfect and consummate title. One class of cases to be excepted is where an act of Congress grants lands, as is sometimes done, in words of present grant; but we need not go into these exceptions. The general rule is what we have stated."

It being the general rule that nothing but a patent will operate to divest the United States of its legal title to the public domain, there is nothing in this case which makes it an exception to that general rule, and the labored and ingenious effort of counsel for plaintiff in error to put this case on all fours with grants containing words evidencing an intention on the part of Congress to make a present grant has been heretofore sufficiently discussed in this brief.

But it may be argued that the officers of the land department, by their rulings, refused to issue a patent to this grant, on the ground that "the question as to the mineral or nonmineral character of this land has [had] been passed upon by competent authority."

This contention is based upon a letter of Commissioner Williamson, dated March 21, 1879 (Rec., pp. 12, 13, and 14), and as this letter is quoted at length twice in plaintiff's brief, and it, together with subsequent correspondence based upon it, forms the basis for a large portion of plaintiff's brief and the only basis of his title to mineral land, it is deserving of more than a passing notice.

This letter is sought to be used as if deciding a question then pending before him, viz, an application for a patent to this land.

If the letter is to be construed in this light, then, in so far as it passes upon that question, the decision, being by the proper officer of the Government, is entitled to great, if not conclusive, weight.

Let us view it in this light, viz, as an application for a patent by the representatives of the grant claimants, and we find that this application was *denied*. That is the entire *record*. That is what is conclusive upon the Government—or rather in favor of the Government—and this adjudication of the Commissioner *against* the issuance of a patent is sought to be used here to the same effect as if he had decided that question the other way.

It is true that in refusing to issue the patent the Commissioner gives *reasons*, which form, as before stated, the principal basis for plaintiff's brief.

Now, the weight to which the Commissioner's *decision* is entitled is fixed by law. The weight to which his *reasons* are entitled is greater or less, as such reasons may or may not accord with the law and the facts in the case.

If the reasons are to be read in the light of the facts as they then existed, it will be borne in mind that at that time the property in dispute was "known to be mineral" in character and had been so known for three years or more. If those reasons are to be read as constructions of the legal effect of the acts of his predecessors, then I assume that to be a question which it is the province of

this court to pass upon, after full hearing, and when all parties in interest have had an opportunity to present and support their respective claims.

In short, if this letter is quoted as an adjudication of a matter then pending before the Commissioner, we have simply to say that it was decided without notice and without evidence, and was in any event decided in favor of the Government; and, if it is quoted as a legal opinion as to the effect of the acts of his predecessors, it is mere hearsay and should be given such weight, and such weight only, as its own reasoning entitles it to. As its reasoning is contrary to the settled practice of the Department and contrary to repeated decisions of this court, it seems to us that its length and the space which it occupies in the brief of counsel, are its principal recommendations to notice. The letters of Commissioner McFarland and Acting Commissioner Stone are of the same character, and what has been said above applies equally to them.

However this may be, this court is not bound by the decision of any of the officers of the Land Department upon a question of law, as was decided in the case of *Irvin against Marshall* (20 How., p. 567), where Mr. Justice Daniels, speaking for the court, said:

> "It has been argued that it is the practice of the officers of the Land Office to receive the certificate of purchase as presenting upon its face the only evidence of title, and that those officers will recognize no other evidence of title but this certificate. Of the practice or the opinion of the officers of the Land Department, no evidence is exhibited upon this record. But, supposing these to be in accordance with the above suggestion, they could by no

> means control the action or the opinion of this court in expounding the law with reference to the rights of parties litigant before them; and this they must do, in accordance with their own convictions, uninfluenced by the opinions of any and every other department of the Government."

Under the act of Congress the power to make selection of the land to satisfy this grant is vested in the heirs of Luis Maria Baca. They were the sole judges of what lands should be selected and surveyed. The duty of the surveyor-general was to make survey and location "*of the lands so selected by the said heirs of Baca.*" That the mere selection of the lands by the heirs of Baca could not operate as an adjudication or an estoppel upon the Government seems to be axiomatic, if it be borne in mind that they were the sole judges of the land to be selected. Can any man be a judge and make an adjudication in his own favor and against another? Can any man create an estoppel against another by any transaction in which he himself is the only participant? Could "the said heirs of Baca," by their own act, by ignoring the very provisions and limitations which Congress had incorporated into the act as the protection of the Government in the transaction, gain an advantage to themselves and against the Government?

Again, the authority vested in the surveyor-general to survey this land certainly gave him no power to pass upon the mineral or non-mineral character of the land. The survey relates merely to the ascertaining and fixing the boundaries and preserving a record of the same in the form of plats and field notes, and has nothing whatever to do with any adjudication as to the character of

the land, nor can an officer who is merely authorized to make a survey estop the Government except as to matters necessarily included in a survey.

But I do not understand it to be contended by counsel for plaintiff that the mere exercise of the power of selection by the Baca heirs operated passed the title to this land from the Government, or concluded the Government upon the question as to the mineral or non-mineral character of the land; nor do I understand counsel to contend that the mere authority to survey vested in the surveyor-general power to make any finding or adjudication which should be binding upon the Government as to the mineral or non-mineral character of the land; but counsel seem to have found some comfort in the words "to be located" and "make location," as found in the act, and seem to have argued themselves into the belief that these words included the power to pass judgment as to the character of the land and to estop the Government to say that this land is mineral.

The word "locate" has a well-understood meaning, and is applied differently in accordance with the connection in which it is used. Thus the words "to be located," when used with reference to the Baca heirs, means the "designation by *approximate boundaries* of a specific tract;" whereas, by the words "make location," when used in connection with the word "survey" in fixing the duty of the surveyor-general, is evidently meant that these boundaries shall be definitely and certainly fixed by the survey. So that by the words "to make survey and location of the lands so selected" is

meant nothing more than to make survey and thereby locate the lands selected, etc.

It is well understood that the surveyor-general is not a judicial officer; that save in exceptional cases he has no judicial functions, and in those exceptional cases such powers have been expressly vested in him by law, and his power to exercise them is prescribed and limited by the act investing him with the power. And it has never been held that the mere power to make survey and location of a piece of land authorized any officer of the Government to make a judicial finding or to make a final ascertainment as to the character of the land which would be an estoppel as against the Government.

As is said by Secretary Noble in the case of *Railroad Company against Valentine* (11 L. D., p. 238; L. C. 244):

> The Secretary of the Interior is clothed with the authority of determining in the first instance which lands passed by the grant, and which did not pass, and this he does by approving lists for certification or patent.

The same rule was announced by Secretary Teller in the case of *Cole against Markley* (2 L. D., 847; L. C. 849), quoted with approval by this court in the case of *Barden* v. *The Northern Pacific Railroad Company* (154 U. S., p. 288; L. C. 320). In the latter case this court says:

> Some weight is sought to be given by counsel of the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868, and a plat thereof filed by the surveyor in the local land office in September of

that year, from which it is asserted that the character of the land was ascertained and determined, and reported to be agricultural, and not mineral. But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the surveyor-general. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted, or to make any binding report thereon.

* * * * *

The determination of the character of the land granted by Congress, in any case, whether agricultural, or mineral, or swamp, or timber land, is placed in the officers of the Land Department, whose action is subject to the revision of the Commissioner of the General Land Office, and on appeal from him, by the Secretary of the Interior. *Under their direction and supervision, the actual character of the land may be determined and fully established.*

It thus appears that no authority was vested in the surveyor-general under the general law to make the adjudication or to create the estoppel set up by the plaintiff in this case; nor did he have any such power or authority by virtue of the granting act of 1860.

It is, perhaps, proper to next inquire whether such authority was delegated to him by the Commissioner of the General Land Office.

On December 8, 1860, the surveyor-general certified to the heirs of Baca the number of acres included in the Las Vegas land grant, and on February 9, 1863, he forwarded to the Commissioner of the General Land Office a statement of the selection of what is now known as Baca grant No. 4 and the application for survey and location

of the tract by the attorney of the applicants (copy of which application seems to have been sent to the surveyor-general of Colorado and Utah—Colorado Territory having in the meantime been created), and the surveyor-general of Colorado and Utah gave to the Commissioner of the General Land Office the following information:

> "I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca floats, and should locate it as this is located, for the reason that, in his opinion, it would cover rich minerals in the mountains."

Action was taken upon this application by the Acting Commissioner March 13, 1863, which action appears on page 5 of the printed record, and the following is quoted therefrom:

> "It is necessary, before the application can be approved *by this office*, that it be accompanied by the certificate of the surveyor-general and the register and receiver that the land is vacant and not mineral. * * * Especially should the character of the location as to minerals be carefully ascertained, after the important statement of ex-Governor Gilpin which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, you will transmit to this office your official certificate setting forth those facts."

Upon application of ex-Governor Gilpin, the surveyor-general reports, on October 13, 1863, that he has made

a contract with Deputy Surveyor A. Z. Sheldon for the survey of the grant, stating, however, that it was without authority and contrary to the instructions of the Department, but upon the urgent application of ex-Governor Gilpin he had made the contract, subject to the approval of the Commissioner. This contract was disapproved by the Commissioner on November 2, the Commissioner again calling the attention of the surveyor-general to the suspicious circumstances with reference to the location of this float by ex-Governor Gilpin, and stating that the survey must be postponed until the vicinity is reached by the regular progress of the public surveys.

On December 12—the former surveyor-general having in some unaccountable way lost his position—Surveyor-General Pierce makes a report, which indicates that, notwithstanding the disapproval of the contract with Sheldon and in defiance of the instructions of the Commissioner to wait until the public surveys should reach the vicinity, Sheldon has proceeded under his disapproved contract to make the survey of the lands selected by ex-Governor Gilpin.

With this report is transmitted a certificate of the new surveyor-general, that from good and sufficient evidence he was satisfied that the land was not mineral, and vacant.

On January 16, 1864, the Commissioner calls attention to his former instructions, states that the evidence furnished as to the nonmineral character of the land is not sufficient, and suspends the approval of the selection.

On February 12 the Commissioner again considers the report of the surveyor-general respecting Sheldon's survey, and calls attention to the fact that the survey was paid for, not by the Government out of the moneys deposited by the claimant as required by law, but was paid for directly by ex-Governor Gilpin to the surveyor, and that all the testimony on file in the surveyor-general's office is an abstract of the field notes made by the surveyor-general by permission of Mr. Gilpin.

The Commissioner then proceeds to say that this proceeding is irregular, and although the statute requires the private claimant to pay for the survey, yet the work must be done under the obligations and responsibilities of the surveyor-general and his subordinates. To save the expense of a resurvey, however, he authorized the filing of the *original field notes* in the surveyor-general's office, and upon the same being regularly tested and ascertained to be regular and correct, *the surveyor-general was authorized "to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, 'but not to embrace mineral land, nor to interfere with any other vested rights, if such exist.'"*

This letter of February 12, 1864, found on pages 9 and 10 of the printed record, is the basis and foundation of the only authority for the action taken by the surveyor-general. Except for the authority contained in this letter, no survey, even, has ever been made of this land. The land was selected by Gilpin, was surveyed by his employee, and no officer of the United States, so far as

is disclosed by this record, has ever seen the land, made a survey of it, or located it, and not only the action of the surveyor-general with reference to the character of the land, but the survey itself, depends for its validity upon this letter of the Commissioner of the General Land Office.

In accordance with the authority contained in this letter, the field notes and plat of what was up to that time the private survey of A. Z. Sheldon, was approved, and in accordance with the requirement of this letter the approval was "subject to the conditions and provisions of section 6, of the act of Congress approved June 21, 1860."

It is contended by counsel that the Commissioner of the General Land Office had no authority to impose conditions upon the selection not in the act. This is undoubtedly true, and the surveyor-general did not seek to do so. His authority was limited by the letter of the Commissioner authorizing him to approve a private survey. The Commissioner knew, and he knew, that Sheldon was a mere employee of Gilpin, that any report he might make as to the character of the land would not be made "under the usual obligations and responsibilities of deputies and surveyor-general," and though the Commissioner might have been willing to accept and approve the report of a regular deputy surveyor acting under their usual "obligations and responsibilities," and upon such report to approve the survey and location unconditionally, he apparently was unwilling to take that responsibility upon the report of a private employee of Gilpin, and, possibly,

for that reason required the insertion of the words in the approval that the same was "subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860," but whatever may have been in the mind of the Commissioner, those were his instructions—whatever of authority the surveyor-general had as to that private survey he had under those instructions. The plaintiff must take those instructions as a whole, or must repudiate them altogether. He can not accept that portion which is favorable to him and reject that portion which he deems will prejudice him. If he repudiates those instructions then he has no official survey at all. If he accepts them and the certificate made under them, then the reservation of mineral land remains in these proceedings from the granting act to the last official act in connection with the land—the certificate of approval by the surveyor-general.

The condition of this title, as shown by the act and proceedings with reference to the mineral character of this land, is, as has already appeared, as follows:

The granting act reserved the mineral; the authority given by the Commissioner of the General Land Office to the surveyor-general directed him to include the mineral reservation in his certificate. The reservation was included in his certificate, and the plaintiff in error occupies the unenviable position of asking for a judgment based upon the existence of a fact which he alleges in his own pleadings is not a fact. He claims title to a tract of land as being nonmineral which, by the allegations of his complaint and his own proof in the

circuit court, is shown to be in fact mineral land. He claims title to a tract of mineral land as having been granted by an act of Congress which expressly excluded mineral land from its operation. He claims that a tract of land, which he admits is in fact mineral land, is rendered non-mineral because a surveyor-general of Colorado has made a certificate, based on general rumor, that in his opinion it was non-mineral. He claims that this certificate of the surveyor-general is greater than the order of the Commissioner of the General Land Office, by which it was expressly rejected as being based on insufficient evidence. He claims that although Congress did not intend to convey mineral land, and did not convey it, and although the Commissioner of the General Land Office required that it should be expressly reserved in the certificate of approval of the survey, and although it was expressly reserved in the certificate, that he owns it nevertheless, because he succeeded in having it included within the surveyed boundary of the lands he selected.

It is conceded by counsel for plaintiff in error that the approval of the Commissioner of the General Land Office, either express or implied, is essential to make the selection under this act complete. (See p. 52 of brief.) This concession makes unnecessary to sustain by reasoning or authority the proposition that the general control given to the Commissioner of the General Land Office, under the supervision and direction of the Secretary of the Interior, over the disposition of the public domain of the United States, makes his approval essential to any act,

the result of which is to transfer title of the public domain from the United States to any private individual. But it is argued that as the Commissioner of the General Land Office acknowledged the receipt of the survey, with the approval of the surveyor-general indorsed thereon, on May 4, 1864, and took no formal action by way of disapproval, that his approval of the action of the surveyor-general will be implied.

With reference to this argument it must be remembered that the approval of the surveyor-general in itself included the reservation of mineral land, and if the Commissioner of the General Land Office will be held to have approved the action of the surveyor-general, then such approval must go to the entire certificate. In other words, plaintiff can not contend that inaction on the part of the Commissioner of the General Land Office operated as a passive approval of the certificate in so far as said certificate validated the unauthorized survey, and rejected that portion of the certificate which recited that it was subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860; that this certificate approval must stand as a whole or it must fall altogether. With it the mineral land is reserved, even though within the land surveyed; without it plaintiff has no pretense of any authorized survey or location by the officers of the Government.

That the Secretary of the Interior did not deem the question of the mineral or nonmineral character of the land as determined until he, or some officer of the Government thereto duly authorized, had judicially passed upon the matter, or until a patent had issued, is shown by his

construction of this identical act of Congress, in case of *Baca float, No. 3* (12 L. D., 676), and the same case on review (13 L. D., 624), and the latter decision is so apt, and the position stated in such forcible language, that I take the liberty of quoting therefrom as part of the argument in this case:

> The evident intention in all these acts was to prevent the title to mineral lands from passing thereunder, and to express that intention the language in the act mentioned is just as clear as that used in the others. The language used in the act under consideration should be given the same prohibitive force as is accorded the other acts above mentioned. If this be true, and I do not think it can be successfully controverted, it follows that the reasoning in the Valentine Case applies with equal force in the case now under consideration, and that the rule there laid down should be followed here. That rule was followed in the decision complained of, and hence there is no reason to modify it as to that point.

The relation existing between the officers of the Department and the surveyor-general is well understood, and is well stated in the case of *Winscott against The Northern Pacific Railroad Company* (17 L. D., 274), and in Northern Pacific Railroad Company against Marshall (17 L. D., 545), in which latter case the Secretary quotes with approval from the former as follows:

> "The report of the surveyor must necessarily constitute but a small element of consideration when the question is as to the true character of the land."

And if this be the case where the survey is made by a regularly authorized deputy surveyor, under the "obligations and responsibilities" of that position, and under

the direct supervision of the surveyor-general, of how much less weight is the report of a surveyor employed and paid by a grant claimant under the circumstances detailed in this case.

The question as to the relation of the Secretary of the Interior and Commissioner of the General Land Office to public lands is discussed in the case of *Stoneroad against Stoneroad* (158 U. S., p. 240), where grant No. 1, confirmed by the first section of the act of June 21, 1860, was under discussion, and in that case the court says:

> "At the time of the passage of this act (the act of June 21, 1860), and for a long time prior thereto, the general laws of the United States confided to certain administrative officers the duty of surveying not only the public lands, but also private land claims. The practice of the United States in dealing with the public domain and all governmental grants of lands is to survey *and issue a patent*."

And this decision then proceeds to hold that in all important matters, up to the date of the issuance of a patent all questions relating to disposition of the public domain and surveying of private-land claims and issuance of patent thereon, the Secretary of the Interior is the supervising agent of the Government to do justice to all claimants and preserve the rights of the people of the United States.

As has been seen, this act vests that responsibility in no other person, and hence no other person but the Secretary of the Interior, or some officer of his Department acting under his authority, could bind the Government, by an adjudication or by way of estoppel, as to the mineral or nonmineral character of this land.

As heretofore stated, the admission of counsel that the approval of the survey by the Commissioner of the General Land Office, either express or implied, is necessary to make it valid, makes it unnecessary to support that position by citation of authorities or by reasoning.

In view of this admission, and the well-known law on the subject, section 6 of the act of 1860 will be construed as though it read, "subject to the approval of the Commissioner of the General Land Office," such approval, of course, to be confined to passing upon the character of the land as to being vacant and non-mineral. And it has been repeatedly held that where such a provision is included in a statute formal action of the Land Department is necessary in order to validate a location or selection, such action being by way of formal official approval of certificate of selection or location or by the issuance of a patent.

In the case of *Wisconsin Railroad against Price County* (133 U. S., 496), a railroad grant to the State of Wisconsin for the purpose of aiding in the construction of a railroad was under consideration by the court, and the question at issue was when the title passed out of the United States and into the grantee, so as to make the same taxable under the law which exempts property of the United States from taxation, and the court held that as to lands within the primary limits of the grant, so soon as

> "The route of the road was definitely fixed, the sections granted became susceptible of identification and the title attached to them and took effect as of

> the date of the grant. * * * But as to the remainder of the lands which fell within the indemnity limits the case is different. For such lands no title could pass to the company, not only until the selections were made by the agents of the State appointed by the governor, but until such selections were approved by the Secretary of the Interior. But that officer never approved them. Nor can such approval be inferred from his not formally rejecting them."

It may not be amiss to review in a few words some of the authorities cited by counsel for plaintiff in error.

In the case of *Davis, administrator, against Weibold* (139 U. S., 507), the contest was between a *patentee* under the town-site law and one claiming under a *subsequent patent* under the mining laws of the United States, and the question at issue was thus stated by Mr. Justice Field, who delivered the opinion:

> "When the entry of the town site was had, *and the patent issued*, and the sale made to the defendant of the lots held by him, it was not known—at least it does not appear that it was known—that there were any valuable mineral lands within the town site, and the important question is whether in the absence of this knowledge the defendant can be deprived under the laws of the United States of the premises purchased and occupied by him because of a subsequent discovery of minerals in them and the issue of a patent to the discoverer."

This extract from the opinion shows how foreign discussion of that case is to any question involved in this.

In the case of *Deffeback* v. *Hawke* (115 U. S., 392), the same judge, in discussing a similar question, uses

language showing that the date of the patent is the date at which the right to mineral lands not known to be mineral accrues to the settler. In this case the mining claim was located and the land bought before the town site was located or applied for, and in discussing the question the court uses the following language:

> "It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and *patented by the Government* under the preemption laws, may be found, years *after the patent has been issued*, to contain valuable minerals. Indeed this has often happened. We therefore use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made *and the patent issued*."

In the case of *Ryan against Carter* the statute, instead of being "quite similar" to the one now under discussion, uses this language:

> That the rights, titles, and claims *shall be, and the same are hereby, confirmed to* the inhabitants of the respective towns or villages, etc.

In the case of *Menard against Massey* (8 How., 293), the only question was as to the boundaries of the grant, and the only matter as to which the United States was held to be concluded was that properly within the powers of the surveyor, namely, the fixing of the boundary lines. This was purely a ministerial act and involved no decision or adjudication as to the character of the land, nor did it involve the exercise of any judicial or quasi judicial function.

This is also true of the cases of Cousin against Bone, executor (19 How., 292); *Frazier against O'Connor* (115 U. S., 102); *McCreery against Haskell* (119 U. S., 327), *and Tubbs against Wilhoit* (138 U. S., 134).

In the case of *Langdeau against Hanes* (21 Wall., 521), the granting act was in the usual form of a grant *in præsenti*, using the words "be and the same are hereby confirmed."

In the case of *Ryan against Forsythe* (19 How., 334), the General Land Office had recognized and approved the survey by the issuance of a patent.

The citation of counsel from the case of *Stark against Starr* (6 Wall., 413) would have been of more assistance to the court had he extended it a few lines. Counsel quotes as follows:

> "The right became perfected when the certificate of the surveyor-general and accompanying proofs were received by the Commissioner of the General Land Office *and he found no valid objection to them.*"

If counsel had taken time to read a little further, it would have been found that the court proceeded to make this statement plain by the use of this language:

> "That is to say, if the donation act of 1850 was applicable to the lands, his right to a patent became perfect when the certificate of the surveyor and accompanying proof showed, in the judgment of the Commissioner, a compliance with its requirements. *That they were satisfactory to his judgment in this respect follows from the subsequent issuance by him of the patent.*"

Counsel seem to have found some difficulty in understanding what was meant by Commissioner Edmunds in

his letter of instructions of February 12, 1864, by the use of the expression "but in your certificate of approval you will add the special reservation stipulated by the statute, 'but not to embrace mineral land nor to interfere with any *other vested rights*, if such exist,'" and counsel in their difficulty inquire, "Why did he say 'other' vested rights?" and then proceed to argue that the very word implies that the alternative expression involved some "vested rights."

We are unwilling that counsel should be uncertain as to the meaning of any expression in this important letter of instructions, on which their entire title depends, and take pleasure in giving, in our poor way, what we deem to be the meaning of that expression.

By the terms of the act two classes of lands are expressly excepted from its operation: First, land that is not vacant, and, second, mineral land.

It was the intention of the Commissioner that the certificate should include these identical reservations, hence the requirement that the certificate should recite that the approval was not to include mineral land, nor was it to include lands not vacant, and the vested right of the Government in mineral lands was one class of vested rights which that certificate reserved, the other class of vested rights being the rights of settlers or occupants of lands not vacant.

It seems impossible to distinguish this case in such a manner as to prevent the application of the principle announced in the case of *Borden* v. *N. P. R. R.* (154

U. S., 288), cited and quoted from at length in briefs of both the original parties to this case.

If it be conceded that the act of Congress, the selection, and the survey vested in the heirs of Baca only an equitable title, as was held in the case of *Cutter* v. *Ruddy* (*supra*), then this case is much stronger than the Barden Case, and calls much more plainly for the application of the principle invoked there, while if it shall be held that the act operated as a grant *in præsenti*, this case is still clearly within the rule there decided.

In this action of ejectment it hardly seems necessary to reply to the appeal to the equity side of this court with which the brief for plaintiff in error concludes. It is well understood that this is strictly a legal action; that when the Baca heirs accepted the grant of 1860, with the reservations, they took the same *cum onere*, and that they must bear the burden of the reservation unless that incumbrance has been removed.

It may not be out of place, however, to call attention to the fact that this was an exchange of property, acre for acre; that the right of Baca to his original grant was subject to this same burden or reservation, and that under the terms of his original grant there were no means by which the incumbrance or reservation could be removed, and that had he taken his original grant *in place*, and had there been no change of sovereignty, all minerals were *perpetually* reserved to the Government. (Rockwell's Spanish and Mexican Law, p. 49, secs. 1, 2, and 3; ibid., p. 112, 113, and 114.)

This, of course, was a matter for consideration of Congress, and but brings us back to the true rule in the case, that plaintiff must recover upon the act of that body and steps taken under it.

Those may be recapitulated thus:

June 21, 1860. Act giving right of selection from vacant lands not mineral (R., 2).

February 5, 1863. Application to select and locate filed (R., 3 and 4).

February 24, 1863. Department notified of intention of ex-Governor Gilpin to locate mineral land (R., 4).

March 13, 1863. Commissioner requests the report as to character of land (R., 5).

October 13, 1863. Surveyor-general reports conditional contract for survey with Sheldon (R., 5).

November 2, 1863. Sheldon contract disapproved (R., 6).

December 12, 1863. Report of surveyor-general that land is nonmineral and transmitting Sheldon's survey (R., 7).

January 16, 1864. Report of surveyor-general as to character of land disapproved (R., 8).

February 12, 1864. Survey of Sheldon disapproved but permission given to approve same if found correct including in certificate, reservation in granting act (R., 9).

March 15, 1864. Field notes approved by surveyor-general (R., 11).

March 18, 1864. Map of survey approved "subject to conditions and provisions of the act" (R., 11).

May 4, 1864. Field notes, etc., filed with Commissioner.

A fair résumé of these proceedings, in so far as they have not been formally disapproved, is as follows:

Congress in 1860 gave to the heirs of Baca a right to select certain vacant lands not mineral.

In 1863 these heirs exercised their right of selection.

In same year the claimants caused a private survey to be made of the lands selected.

In 1864 the surveyor-general was authorized to approve such private survey upon condition that he should include in his certificate the reservations included in the act. In the same year, in compliance with this authority, he does approve this survey, and in his certificate recites that the approval "is subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860."

In other words, Congress did not intend to grant mineral land and did not grant it; the Commissioner did not intend that any mineral land should pass by any act of his Department, nor did it pass; the surveyor-general, by his certificate of approval, expressly reserved mineral lands, and yet, in face of the expressed intention of Congress and of every officer of the Government, who ever had anything to do with this grant, it is claimed that land, admitted and known to be mineral for more than twenty years, passed by the grant.

We respectfully submit that the questions submitted should be answered as follows:

First. The action of the Commissioner of the General Land Office and of the surveyor-general was not a decision that none of the lands included in Baca grant No. 4

were mineral lands, nor that the same were a valid location upon the ground covered by said grant of a selection of that tract.

Second. No.

Third. Yes.

All of which is respectfully submitted.

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